

**ORIGINAL**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

**RECEIVED**

**OCT 16 1995**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
Policies and Rules Concerning )  
Children's Television Programming )

MM Docket No. 93-48

Revision of Programming Policies )  
for Television Broadcast Stations )  
)

**DOCKET FILE COPY ORIGINAL**

**COMMENTS OF THE**  
**NATIONAL ASSOCIATION OF BROADCASTERS**

NATIONAL ASSOCIATION OF  
BROADCASTERS  
1771 N St., NW  
Washington, D.C. 20036

Richard V. Ducey, Ph. D.  
Senior Vice President  
Research and Information Group

Henry L. Baumann  
Executive Vice President &  
General Counsel

Mark Fratrik  
Vice President/Economist

Valerie Schulte  
Sr. Associate General Counsel

Gerald G. Hartshorn  
Director of Audience Measurement and  
Policy Research

Jack N. Goodman  
Vice President/Policy Counsel

October 16, 1995

No. of Copies rec'd  
List A B C D E

019

## TABLE OF CONTENTS

### Summary

I. Introduction .....	1
II. The Children's Television Act, as Implemented by the Commission's Current Rules, and the Marketplace Are Working to Provide a Healthy and Steadily Increasing Supply of Children's Educational and Informational Programming.....	3
A. NAB Has Demonstrated Previously That Television Licensees Have Responded to the Children's Television Act By Broadcasting a Significantly Increased Amount of Educational and Informational Children's Programming.....	3
B. New Survey Research Confirms the Significant Increases in the Amount of Educational and Informational Programming Presented By Television Licensees in Response to the Act and the Commission's Current Rules. ....	5
1. Television licensees have increased the amount of educational and informational programming they present by <i>more than 100%</i> since the Act was passed .....	6
2. NAB's research confirms earlier findings of significant increases and is the proper way to evaluate compliance with the Children's Television Act.....	7
C. There is a Healthy Supply of Programming Coming Into the Marketplace in Response to the Demand .....	9
III. There is Neither A Need Nor a Sound Basis to Impose a Quantified Children's Programming Requirement. ....	10
A. Congress Expressly and Intentionally Legislated A Specific But Unquantified Children's Programming Obligation and Intended Broad Broadcaster Discretion As To Compliance.....	10
B. The Current Rules Have Stimulated and Are Stimulating More Educational and Informational Children's Programming.....	13

C.	Commercial Broadcast Television Provides Only A Part Of the Educational and Informational Children’s Programming Available in Every Market.....	14
IV.	The Current Definition Is Working And Is More In Keeping With Congressional Intent Than the Proposed Definition Which Is Flawed In Significant Respects. ....	16
A.	Congress Intended A Broad Definition of Educational and Informational Children’s Programming and Broad Broadcaster Discretion. ....	16
B.	The Congressional Definition Is Clear and Is Working .....	17
C.	Television Appropriately Serves Children’s “Educational an Informational Needs” With A Wide Variety of Types of Programming.....	19
D.	The Proposed Definition Is More Restrictive and Burdensome Than the Congressional Definition and Eliminates Incentives to Present Valuable Educational and Informational Programming. ....	21
V.	The Commission’s Proposed Rules Would Violate the First Amendment .....	26
VI.	The Commission’s Proposal To Monitor the State of Children’s TV Provides the Incentive For Stations To Maintain or Increase the Level of Children’s Educational and Informational Programming, Despite the Low Viewership and Profitability of These Shows .....	34
VII.	Conclusion.....	35

### **List of Attachments**

- Attachment 1**      The 1990 Children's Television Act: A Second Look on Its Impact, October 16, 1995 ("1995 NAB Study").
- Attachment 2**      KIDSNET Media Guide, August (Laura McGough ed., 1995)
- Attachment 3**      30 Statement of Peter Walker, June 28, 1994, filed in MM Docket No. 93-48, June 15, 1994, at Exhibit A ("INTV Syndication Study")
- Attachment 4**      Lynn O'Brien Ph.D, Educational and Informational Children's Television Programming An Examination of Current Research, (August 5, 1995)(unpublished research study, filed in MM Docket No. 93-48) ("O'Brien Study").
- Attachment 5**      Kids 2-11 Television Viewing, Nielsen Peoplemeter, in the 4th Quarter 1994.
- Attachment 6**      Statement of Professor Rodney A. Smolla.

## SUMMARY

The National Association of Broadcasters, in its comments in response to the Notice of Proposed Rule Making in the children's television proceeding, demonstrates that the goal of the Children's Television Act to increase the amount of children's educational and informational broadcast television programming is being fulfilled by the increasing amounts of this programming presented by broadcasters in all markets.

Broadcasters in fact have responded to the Children's Television Act and the Commission's current rules by *more than doubling* the amount of specifically designed educational and informational children's programming presented since the Act took effect in the fall of 1991. NAB calls this increase significant and substantial and confirmation that current Commission rules implementing Congress' intended scheme are working.

NAB submitted a new survey of all television stations that confirms the significant increases demonstrated to the Commission in June 1994 and shows a continued increase since the previous survey. Specifically, the average station in fall 1994 was airing *over 4 hours* of regularly-scheduled specifically-designed educational and informational children's programming per week, *an increase of more than 100%*. In 1990 the average station was airing 2 hours of children's educational and informational fare per week. Stations in all market sizes show these substantial increases. In addition, each station, on average, broadcast in fall 1994 *128% more educational and informational specials* specifically designed for children from the amount of such specials broadcast in 1990.

The *total educational and informational programming* specifically designed for children broadcast by the average television station per week in fall 1994 was *4 hours and 18-1/2 minutes, almost 4 and 1/3 hours per week*, up from 2 hours and 6 minutes in 1990. Thus, *the average station has added to its weekly schedule, since the passage of the Act, 2 hours and 12-1/2 minutes of educational and informational programming specifically designed for children.*

NAB's comments also maintain that its new survey confirms earlier findings of significant increases and asserts that the NAB research design is the proper way to evaluate compliance with the Children's Television Act. First, NAB's 1995 survey had nearly a 60% response rate from all television licensees. Second, the new research confirms the substantial programming increases of the overall industry by showing that there was no negative non-response bias in last year's survey results. In fact, the *non-responders* to the 1994 Survey broadcast more educational and informational programming specifically designed children in fall 1993 than did the previous study's responders.

Lastly, NAB restates its firm conviction that the design of the NAB Surveys, assessing the performance of stations *as required by the Children's Television Act and the Commission's rules*, is the proper and appropriate and *only* way for NAB, or the Commission, to evaluate compliance with the Act and the rules. NAB gathered data on programming that the Act specifically directed broadcasters, *in their judgment*, to program and report. It is precisely this good faith judgment of broadcasters that the Act of the First Amendment charge the FCC *not to second-guess*, but rather, to defer to.

Moreover, assessing the amount of specifically designed educational and informational programming as listed by stations seems to be the only defensible way for the NAB, or the FCC, to assess the amount of programming broadcast in response to the Act. By what standards should NAB or the FCC or any other researcher assess the amount of “educational and informational” programming broadcast? NAB suggests that Congress placed the responsibility for the fair characterization of programming under a broad but clear definition in the hands of the broadcaster and that it is thus only broadcasters good-faith listings that are properly and appropriately “counted” as to industry compliance with the Act.

NAB maintains that there is neither a need nor a sound basis to impose a quantified children’s programming requirement. Congress expressly and intentionally legislated a specific but unquantified children’s programming obligation and intended broad broadcaster discretion as to compliance. NAB details the legislative history of the Act that makes crystal clear that *Congress intended no quantification* of the programming standard and that it intended to afford broad discretion and flexibility to broadcasters in defining and meeting their programming obligation.

NAB maintains that the Congressional definition is clear and is working and that the vast majority of broadcasters understand and properly apply the Congressional definition that was adopted by the Commission.

NAB submits that Congress did not intend for “qualifying” programming to be “academic” or “instructional” or even that it need be “intellectual.” NAB further submits that Congress got the definition right, that children “learn” from a broad range of types of programming, that

“learning” encompasses much more than academic subjects and that children themselves consider a broad range of programming as “educational and informational.” These points are demonstrated in a study accompanying NAB’s comments of children’s learning and television, by Dr. Lynn O’Brien, a Ph.D. in education, with a specialty in children’s learning and television.

NAB maintains that the proposed definition is more restrictive and burdensome than the Congressional definition and eliminates incentives to present valuable educational and informational programming. NAB opposes adoption of the proposed definition.

NAB further maintains that the Commission’s proposed rules would violate the First Amendment. NAB characterizes these proposals as *extraordinary* and *a first* in the 61 years since the passage of the Communications Act of 1934 that the Commission has required licensees to air specific amounts of programming that fall within a precise government definition. Because this unprecedented extension of the Commission’s power over the content of the programs on broadcast stations does raise exceptionally broad questions under the First Amendment, NAB asked Professor Rodney A. Smolla of the Institute of Bill of Rights Law at the Law School of The College of William and Mary to analyze the commission’s proposals and the arguments raised by the Chairman in recent speeches in light of the established First Amendment principles governing regulation of broadcasting. Professor Smolla’s statement is appended as an attachment to NAB’s Comments.

Professor Smolla concludes that the adoption of either the proposed processing guidelines or the mandatory programming standard, together with the proposed new definition of qualifying programming, would violate the First Amendment. Professor Smolla reaches this conclusion



based, for purposes of analysis, on an analysis of the cases that have permitted some abridgment in broadcast regulation of the normal First Amendment standards and under traditional First Amendment standards.

Professor Smolla points out that the Constitution does not permit the government to dictate speech based on a perceived market failure. Professor Smolla also explains that, in the Supreme Court's most recent explanation of its broadcast jurisprudence, Turner Broadcasting, Inc. v. FCC, it categorically rejected the notion that the Commission had the authority to do what it proposes to do here -- define a particular type of programming that broadcasters must air.

NAB urges that the Commission, rather than treading more heavily in this First-Amendment sensitive area, continue the course set by the Congress and the Commission's current rules, which is in fact fulfilling the Act's goal of increased educational and informational children's programming on broadcast television.

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
Policies and Rules Concerning	)	
Children's Television Programming	)	MM Docket No. 93-48
	)	
Revision of Programming Policies	)	
for Television Broadcast Stations	)	
	)	

COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")<sup>1</sup> hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned docket.

I. Introduction.

In 1985, NAB established the Service To Children Television Awards to honor locally produced children's programming. Over the years, this Award's competition has recognized the special efforts of large and small television stations, affiliates and independents, from all-sized markets who produce, promote and air quality local children's programs. Entries have covered a wide range of issues, including environmental subjects, child safety, violence, conflict resolution and alcohol and drug abuse. The Awards program has paid tribute to those local broadcast writers, producers and other staff who are working so diligently for the children in their communities.

---

<sup>1</sup> NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

These broadcaster efforts for children have continued and have been amplified, in various ways and amounts, in response to the call of Congress and the FCC for more educational and informational programming for children. In the fall of 1990, the Congress of the United States passed the Children's Television Act of 1990, to establish specified limits on the amount of commercials allowable in children's programming generally *and* to increase the amount of educational and informational broadcast television programming for children, including educational and informational programming specifically designed for children. Both Congressional goals *are* being fulfilled today.

Broadcasters take seriously their obligations under the Act and their responsibility to children and have responded with widespread compliance with the commercial limits<sup>2</sup> and with *substantial and significant increases* in the amount of educational and informational programming specifically designed for children. These increases have occurred and continue to be seen *across all market sizes*. They represent real efforts, real realignment of programming schedules, real program acquisitions and real financial commitments. They do not come free of cost. They do not win over droves of viewers. But they come and they continue. And they come in response to the scheme carefully crafted by Congress to balance government action in a First Amendment-sensitive content area with a broad definition of responsive programming, an intentionally-unquantified programming obligation, and wide and individual broadcaster discretion.

Simply put, *the Act and the marketplace are working* to provide substantial and steadily increasing amounts of educational and informational children's programming. There is neither a need nor a sound basis to overlay on the Congressional scheme an unintended quantified programming obligation or other additional requirements that unnecessarily intrude on a "working" marketplace.

---

<sup>2</sup> See Notice of Inquiry in MM Docket 93-48, 8 FCC Rcd 1841 (1993) at fn 14.

Broadcasters' commitments to children are real. They are represented by programming and by non-broadcast efforts. They have increased in response to the Act. They are quantifiable. And they are supplemented in every market by a healthy supply of educational and informational children's programming from other video sources. And, despite the various costs of increasing the amount of educational and informational children's programming in response to the Act, broadcasters, in all sized markets, have continued their individualized commitments to children by producing and airing unrequired *local* children's programming, the finest of which is submitted to the NAB Service to Children's Awards competition each year.

II. The Children's Television Act, as Implemented by the Commission's Current Rules, and the Marketplace Are Working to Provide a Healthy and Steadily Increasing Supply of Children's Educational and Informational Programming.

NAB here submits clear and convincing evidence that broadcasters, under current FCC regulation, have responded to the Children's Television Act with substantial and continued increases in the level and quality of educational and informational children's television programming. NAB submits that the levels of broadcasters performance, *having risen over 100%* in the four years since the Act was passed, coupled with a programming marketplace that has continued to respond to broadcaster (and cable) demand for educational and informational programming, demonstrate that the Act, as currently implemented, is working.

A. NAB Has Demonstrated Previously That Television Licensees Have Responded to the Children's Television Act By Broadcasting a Significantly Increased Amount of Educational and Informational Children's Programming.

In July 1994, NAB submitted research demonstrating that television licensees increased, from 1990 to fall 1993, the amount of regularly-scheduled educational and informational children's programming presented, on average, by 81%, which we described as "significant" and "dramatic."

The NAB 1994 Children's Television Programming Survey<sup>3</sup> showed the average station in the fall of 1993 airing 3-2/3 hours of *regularly-scheduled* educational and informational programming per week, up from 2 hours per week in 1990 before the Act took effect (in the fall of 1991). The increase was seen across all markets and across all types of stations. That survey showed as well 86.4% more hours of educational and informational *specials* for children.

The 1994 NAB Survey tested the right thing in the right way. The instant Notice recites criticism leveled against that Survey, namely that it "accepted at face value station claims as to the educational content of their programming."<sup>4</sup> NAB submits that NAB's research design was and is the proper approach and that *it is in fact the approach that the FCC would have to take* in similarly assessing compliance levels. That is, in assessing compliance, the FCC would *per force* need to accept

---

<sup>3</sup> The 1990 Children's Television Act: Its Impact on the Amount of Educational and Informational Programming, National Association of Broadcasters, June 1994, filed in MM Docket 93-48, June 27, 1994 ("1994 NAB Study").

<sup>4</sup> See Notice of Proposed Rule Making in MM Docket No. 93-48, 10 FCC Rcd 6308 (1995) at ¶ 18. The Notice went on to say that "a cursory review of the children's programming reports submitted as part of license renewal applications reveals that broadcasters have misidentified certain programs as contributing to their compliance under the CTA" and that this "experience . . . calls into question the reliability of the results presented and the amount of programming on the air they would purport to document." NAB notes that the Notice here, in its supporting footnote, names two listed titles as "misidentified" but does not indicate any station's inability to justify as listing those shows or why it is otherwise obvious that those two shows could not be considered educational and informational. Nor does the footnote recite the number of times these two "outliners" were listed. This is certainly not enough to discredit the methodology of a serious research study, designed and conducted by research Ph.D.'s.

The Notice then recites in its supporting footnote that "[o]ther stations have claimed credit for their general audience news programming or game shows such as 'Wheel of Fortune'." Congress explicitly indicated that general audience shows could qualify as serving children's educational and informational needs in compliance with the Act. NAB is not reading the Commission's point here to be that some stations claim only these general audience shows in compliance with their obligation under the Act. NAB here suggests that actual mischaracterizations are *de minimus* and not sufficient to call into question the results and certainty of the significant increases NAB here documents for the Commission.

Congress' explicit direction (as acknowledged in the FCC's Report and Order) to "defer to the reasonable good faith judgments of broadcasters" as to what programming qualifies -- unless individual broadcasters were asked and could not substantiate that their renewal submissions "qualified"-- or, unless the FCC (or others') judgments as to "mischaracterizations" were specifically detailed and their frequency of occurrence accurately estimated so as to see the order of magnitude of the mischaracterizations. NAB submits that the number of "outlier" mischaracterizations would not be enough to affect the percent increases enough to justify dismissing the magnitude of the increases demonstrated by the NAB Surveys.

The Notice further suggests that stations that chose to respond to the NAB Survey "may have made a more significant effort to provide educational programming than those that did not respond, which may have resulted in a overstatement of the effort being made by commercial television broadcasters overall." NAB is pleased to report to the Commission the results of a new study that shows, contrary to the FCC's concern, the non-responders to the 1994 NAB Survey in fact programmed *more* educational and informational fare in 1993 than did the reporting stations. In fact, adding in the increased educational and informational programming of the previous non-responders *actually ups the increase for 1993 (over 1990) to 85.1%.*<sup>5</sup> In the new study, tremendous effort was taken to insure a higher response rate -- this effort was succesful as nearly six out of ten (59.7%) stations contacted responded.<sup>6</sup>

**B. New Survey Research Confirms the Significant Increases in the Amount of Educational and Informational Programming Presented By Television Licensees in Response to the Act and the Commission's Current Rules.**

---

<sup>5</sup> The 1990 Children's Television Act: A Second Look On Its Impact, National Association of Broadcasters, October 16, 1995, filed in MM Docket 93-48, ("1995 NAB Study"), here attached as Attachment 1.

<sup>6</sup> Id., p. 3.

1. Television licensees have increased the amount of educational and informational programming they present by *more than 100%* since the Act was passed.

As, mentioned above, NAB has recently completed a new survey of all television stations to update the amount of specifically-designed children's educational and informational programming broadcast by television licensees in the fall of 1994. That survey<sup>7</sup> shows *more than a 100% increase* in the broadcast of regularly-scheduled educational and informational programming specifically-designed for children from fall 1990 to fall 1994. The average station in fall 1994 was airing *over 4 hours* of regularly-scheduled specifically-designed educational and informational children's programming per week. In 1990 the average station was airing 2 hours of children's educational/informational fare per week. Stations in all market sizes show these substantial increases.<sup>8</sup> In addition, each station, on average, broadcast in fall 1994 *128% more educational and informational specials* specifically designed for children from the amount of such Specials broadcast in 1990.<sup>9</sup>

The 1995 Survey, as noted *infra*, reveals that the 60% of television stations, on average, actually broadcast *more* specifically designed programming in 1993 than the 1994 Survey showed. Thus the average increase for 1993 has been raised to 85.1% over the 1990 level, actually higher than the earlier reported 81% increase.<sup>10</sup> Thus the fall 1994 levels of 4 hours and 5 minutes per week represent an increase of 8.4% for all reporting stations from fall 1993 to fall 1994.<sup>11</sup>

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6, 9.

<sup>9</sup> *Id.* at 4-5.

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> *Id.* at 4

The *total educational and informational programming* specifically designed for children broadcast by the average television station per week in fall 1994 was *4 hours and 18-1/2 minutes, almost 4 and 1/3 hours per week*, up from 2 hours and 6 minutes in 1990. Thus, *the average station has added to its weekly schedule, since the passage of the Act, 2 hours and 12-1/2 minutes of educational and informational programming specifically designed for children.*

2. NAB's research confirms earlier findings of significant increases and is the proper way to evaluate compliance with the Children's Television Act.

NAB's new research study reaffirms the significant increases broadcasters have made in educational and informational programming specifically designed for children in the four years since the Children's Television Act took effect. The amount of specifically designed programming has actually *more than doubled* since fall 1990. NAB's 1995 Survey also confirms, in significant respects, NAB's earlier findings of substantial increases. And NAB's approach is the appropriate one to assess the level of compliance with the Act.

First, NAB's 1995 Survey, showing an average of almost 4 and 1/3 hours of specifically-designed educational/informational programming in fall 1994, had nearly a 60% response rate from all television licensees. NAB's earlier 1994 Survey had a lower 31% response rate.

Second, new NAB research *confirms the substantial programming increases of the overall industry* by showing that there was *no negative non-response bias* in last year's survey results. In NAB's recently completed research, NAB examined whether, as the Commission had queried, the non-responders had not programmed as much specifically designed children's educational and informational fare as the responders, and thus whether the results overstated the performance of the overall industry. The new non-response study<sup>12</sup> concludes to the contrary. That is, the non-responders to the 1994

---

<sup>12</sup> See 1995 NAB Study at 4.



Survey, in fact, broadcast more educational and informational programming specifically designed for children in fall 1993 than did the previous study's responders. This higher response brings up the level of programming broadcast in response to the Act in Fall 1993.<sup>13</sup> These results confirm the clear and fair description of the increases since the Act as "substantial," "significant" and widespread.

Lastly, NAB restates its firm conviction that the design of the NAB Surveys, assessing the performance of stations *as required by the Children's Television Act and the Commission's rules*, is the proper, appropriate and only way for NAB,<sup>14</sup> or the Commission, to evaluate compliance with the Act and the Commission's rules. As discussed *supra*, NAB gathered data on programming that the Act specifically directed broadcasters, *in their judgment*, to program and report. It is precisely this good faith judgment of broadcasters that the Act and the First Amendment charge the FCC *not to second-guess*, but rather, to defer to.<sup>15</sup>

Moreover, assessing the amount of specifically designed educational and informational programming as listed by stations seems to be the only defensible way for the NAB, or the FCC, to assess the amount of programming broadcast in response to the Act. By what standards should NAB or the FCC or any other researcher assess the amount of "educational and informational" programming broadcast? Does the sound of a title reveal a program's "educational and informational" value? Does

---

<sup>13</sup> The larger group of responders from the most recent survey reported airing, on average, 3 hours and 48 minutes per week of children's educational and informational programming in fall 1993, as compared to an average of 3 hours and 40 minutes from the smaller group of responders from the 1994 Survey.

<sup>14</sup> NAB carefully reconsidered its research approach in planning to re-survey stations as to compliance with the Act. We concluded that testing what Congress had explicitly asked of stations to program and list in their public file and submit to the Commission was the proper and most efficacious approach. Just as Congress did not intend for the Commission to substitute its judgment of what programs "qualify," so too we believed it inappropriate under sound research procedures to test anything else, particularly to test some NAB-contrived re-evaluation of listed programming.

<sup>15</sup> Indeed, if it questions the *bona fides* or good faith of particular broadcaster judgments, the Commission can and should, in its renewal review, question any "suspect" listings that are relied on for compliance with the Act.

any particular researcher's judgment of what is "educational and informational" make for a more sound, and more defensible, judgment as to what Congress intended than where Congress placed the responsibility? Do the judgments of children as to what's "educational and informational" stand in better stead? That of teachers? NAB suggests that Congress placed the responsibility for the fair characterization of programming under a broad but clear definition in the hands of the broadcaster and that it is thus only broadcasters' good-faith listings that are properly and appropriately "counted" as to industry compliance with the Act.

C. There is a Healthy Supply of Programming Coming Into the Marketplace in Response to the Demand.

As broadcasters have responded to the Act by acquiring, slotting and airing more children's educational and informational programming, the marketplace has responded by making available more educational and informational shows. As NAB discusses *infra*, INTV's 1994 examination of the fall 1993 syndication marketplace and the increased *availability* of educational shows, conservatively showed an 137.5% increase in available titles from fall 1990 to fall 1993.<sup>16</sup>

In addition to the four broadcast networks and their slate of educational and informational fare, debuting this fall are two *new* broadcast networks, both of which are planning children's blocks counterprogramming to existing schedules and new time periods.

A documentation of the wealth of educational and informational programs available to children is the monthly media guide published by KIDSNET. KIDSNET lists educational children's programming from the four commercial television networks, over 20 cable networks and home video

---

<sup>16</sup> See INTV Syndication Study, *infra* note 29.

offerings. In two recent editions of this monthly publication, June and July 1995, there were 78 and 80 pages, respectively, of educational listings.<sup>17</sup>

### III. There is Neither a Need Nor a Sound Basis to Impose a Quantified Children's Programming Requirement.

NAB maintains that broadcasters have responded to the Children's Television Act with demonstrable and significant increases in educational and informational programming specifically designed for children and that there is thus no need for the Commission to adopt a more regulatory regime of quantified programming requirements. The Act and the Commission's are working. And NAB maintains that Congress clearly contemplated the *unquantified* programming obligation that *is* working, without more regulation, to increase the amount of children's educational and informational programming available free over-the-air from commercial television stations in every market.

#### A. Congress Expressly and Intentionally Legislated A Specific But Unquantified Children's Programming Obligation and Intended Broad Broadcaster Discretion As To Compliance.

The Congress, over three years and after many hearings and many versions of legislation and much negotiation, agreed on and passed legislation establishing, for the first time, a specific statutory children's programming obligation. That statutory obligation is for each station to serve the educational and informational needs of children "through the licensee's overall programming, including programming specifically designed to serve such needs."

The Act itself makes no more mention than that of the content of this obligation. But the legislative history, both the House and Senate Committee Reports<sup>18</sup> and the floor remarks on the bills

<sup>17</sup> KIDSNET Media Guide, August (Laura McGough ed., 1995), here attached as Attachment 2.

<sup>18</sup> The Senate and House Report both state that: "The Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational and informational programming that a

by the subcommittee chairmen,<sup>19</sup> make crystal clear that *Congress intended no quantification* of this programming standard and that it intended to afford broad discretion and flexibility to broadcasters in defining and meeting their programming obligation.

This guiding principle seen in the legislative history, that the broadcaster should be afforded the “*greatest possible flexibility* in how it discharges its public service obligation to children”<sup>20</sup> and that the “committee expects that the Commission will continue to defer to the reasonable programming judgments of licensees,”<sup>21</sup> was reflected throughout the Commission’s Notice<sup>22</sup> proposing rules to implement the Act and its Report and Order<sup>23</sup> announcing rules.

---

broadcast licensee must broadcast to [pass a license renewal review] pursuant to this section or any section of this legislation.” S. Rep. No. 227, 101st Cong., 1st Sess. (1989) (“Senate Report”) at 23; H.R. Rep. No. 385, 101st Cong., 1st Sess. (1989) (“House Report”) at 17.

<sup>19</sup> Senate Subcommittee Chairman Inouye stated during the floor debate on the bill that “[t]he Commission would, of course, expect that each station will itself broadcast some programming specifically designed for children to serve their educational and information needs.... Under this legislation, the mix [of general purpose programming, programming specifically designed for children and nonbroadcast efforts] is left to the discretion of the broadcaster taking into account what other stations, including noncommercial ones, are doing in this important area.... The committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children’s educational and informational [programming] that a broadcast licensee must air to pass a license renewal review pursuant to this legislation. Cong. Rec. S10122 (July 19, 1990) (remarks of Sen. Daniel Inouye) (emphasis supplied).

Similarly, House Subcommittee Markey stated during House debate and passage of the bill that “[t]he legislation does not require the FCC to set quantitative guidelines for educational programming, but instead, requires the Commission to base its decision upon an evaluation of a station’s overall service to children.” Cong. Rec. H8537 (October 1, 1990) (remarks of Rep. Edward Markey).

<sup>20</sup> 136 Cong. Rec. S10121 (July 19, 1990) (remarks of Sen Daniel Inouye) (emphasis supplied).

<sup>21</sup> Id. at 10122.

<sup>22</sup> Notice of Proposed Rule Making in MM Docket No. 90-570, 5 FCC Rcd 7199 (1990) (“1990 Notice”).

<sup>23</sup> Report and Order in MM Docket 90-570, 6 FCC Rcd. 2111 (1991).

The Commission's Report and Order recites that "the legislative history suggest that *Congress meant that no minimum amount criterion be imposed*" and refers to "*this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement.*"<sup>24</sup>

In fact, the primary Congressional authors of the legislative requirement that broadcasters serve children's educational and informational needs not only through the licensee's "overall programming" but with "programming specifically designed to serve such needs," (which had been added by the Senate) characterized in legislative history this obligation:

"each television licensee must provide *at least some* programming specifically designed for children . . . ."<sup>25</sup>

and, again, that

"[t]o fulfill the required standards, each licensee must demonstrate that *some* educational and informational programming targeted specifically at children was provided."<sup>26</sup>

"The Commission would, of course expect that each station will itself broadcast *some* programming specifically designed for children to serve their educational and informational needs."<sup>27</sup>

So too does the Commission's 1993 Notice of Inquiry acknowledge the explicit intentions of Congress with regard to broadcaster discretion and "*Congress' express preference for avoiding quantitative standards.*"<sup>28</sup>

---

<sup>24</sup> Id. at ¶ 24 (emphasis supplied).

<sup>25</sup> 136 Cong. Rec. S10124 (daily ed. July 19, 1990) (remarks of Sen. Wirth) (emphasis added).

<sup>26</sup> Id. at S10127 (emphasis added).

<sup>27</sup> Remarks of Sen. Inouye, supra note 20 (emphasis added).

<sup>28</sup> See Notice of Inquiry, supra note 2, at ¶ 5 (emphasis supplied).

Thus, there can be no question that the scheme established by Congress to expand the educational and informational programming available to children intended that there be no quantification of the programming obligation and that broadcasters be afforded wide discretion in programming to meet their obligation.

Moreover, there is strong evidence that the Act is working as crafted and as intended, to make available, on free over-the-air television, more educational and informational programming specifically designed for children. There is clearly no need nor any basis for the Commission to impose a quantified programming requirement.

**B. The Current Rules Have Stimulated and Are Stimulating More Educational and Informational Children's Programming.**

As seen supra, the Act and the Commission's current rules have spurred a significant increase in the amount of educational and informational programming presented by broadcasters specifically for children, in fact a *doubling* in amount since adoption of the current rules, with the average station airing over 4 hours per week.

Another view of this increased availability of children's educational and informational programming, that from the programming marketplace, was presented by the Association of Independent Television Stations at last year's FCC *en ban* hearing.<sup>29</sup> INTV showed a *three-fold increase* in educational and informational children's programs being cleared in the syndication market 1990 to 1993. INTV identified eight educational and informational shows that together were "cleared" on 576 stations during the 1990 November sweeps period. By November 1993, there were 19 such shows "cleared" on 1746 television stations. And even this analysis *underestimates* the total number of

---

<sup>29</sup> See Statement of Peter Walker, June 28, 1994, filed in MM Docket No. 93-48, June 15, 1994, at Exhibit A ("INTV Syndication Study"), here attached as Attachment 3.

hours of educational shows available in syndication by not counting programs that are broadcast five times a week, by counting only programs “everyone” would agree are educational or informational and by not including the locally-produced educational shows that are not syndicated.

C. Commercial Broadcast Television Provides Only A Part Of the Educational and Informational Children’s Programming Available in Every Market.

While commercial broadcasting now provides a substantial level of children’s educational and informational programming in every television market, there is an abundance of choice for children and their parents in the greater video world in every marketplace. To the extent that parents (and children) desire to have more and different choices in educational and informational programming (of their particular definition), we can expect to see more and varied choices being presented to families across America via an extension of our video world, the expanding universe of computers and multimedia.

But for sure, today’s video world presents a wide and varied choice to most parents and children. In addition to the many hours of children’s educational and informational programming on commercial television, there are the 6 and 1/2 hours<sup>30</sup> per week of educational fare from PBS. (And depending on the number of public stations in one’s market, there are multiple showings of the PBS programming.)

Added to the broadcast offerings are many cable networks geared to children in whole or in part that present a variety of educational and informational fare, available to 98 % of the country and received by 62% of American households with children. Included among them are, The Learning Channel (with a 6 hour commercial-free weekday educational block for preschoolers), The Cartoon Network (expanding its children’s educational offerings next year when it partners with Children’s

---

<sup>30</sup> Broadcasting and Cable, July 24, 1995 at 58.

Television Workshop for a weekly hour of educational fare), The Family Channel Nickelodeon (with its Nick Jr. preschoolers block and a new afternoon block), TNT, USA and Sci-Fi Channel, WTBS, Black Entertainment Television, and The Disney Channel.<sup>31</sup> And, added to the cable offerings for children are two new children's networks, the Children's Cable Network, an educational and informational children's channel, and WAM!, America's Youth Network.<sup>32</sup> And next year Court TV launches Court TV kids, a three-hour block tailored to children.<sup>33</sup>

For the 91.4% of American households with children and VCRs,<sup>34</sup> (SMART, Television ownership surveys, February-March 1995, Statistical research Inc. at 167) there is a wealth of educational and informational programming available on video tape, for parents and children who so choose to add even more (and almost unlimited) choice to their television viewing.

But for the typical U.S. home with an average of broadcast signals,<sup>35</sup> there remains many, many hours of educational and informational programming available on free over-the-air television to be divided among preschoolers, school-aged, and teens and to be complemented with a variety of general audience educational and informational shows, as well as the children's and general audience entertainment shows. This wealth of television and video offerings is of course just part of the mix of books, entertainment, play, family life, school and homework vying for the attention of today's youth. For its part, television continues to serve the child audience and their needs and interests with a growing variety of choices.

---

<sup>31</sup> Id. at 52-56.

<sup>32</sup> Id. at 56.

<sup>33</sup> Broadcasting and Cable, Oct. 9, 1995 at 56.

<sup>34</sup> (SMART, Television ownership surveys, February-March 1995, Statistical research Inc. at 167).

<sup>35</sup> "The average TV household in the U.S. can receive 13.4 over the-air TV stations-whether off-air or via cable..." Television Audience 1994, Nielsen Media Research, 1995 at.



IV. The Current Definition Is Working And Is More In Keeping With Congressional Intent Than the Proposed Definition Which Is Flawed In Significant Respects.

A. Congress Intended A Broad Definition of Educational and Informational Children's Programming and Broad Broadcaster Discretion.

The legislative history of the Children's Television Act is perfectly clear that: one, Congress intended that the definition of the programming mandated by the Act be broad and encompass a broad range of programming; two, what programming fit that definition should be decided by the broadcaster in its discretion; and three, the FCC should defer to broadcasters' reasonable judgments in this regard. In then-Subcommittee Chairman Inouye's presentation of the Children's Television Act bill for consideration on the floor of the Senate, he described the Commerce Committee's intentions:

"The Commission would, of course, expect that each station will itself broadcast some programming specifically designed for children to serve their educational and informational needs. Educational and informational needs encompass not only intellectual development, but also the child's emotional and social development. Special programming which assists children to discover more about themselves, their families, and the world would qualify. . . . The committee expects that the Commission will continue to defer to the reasonable programming judgments of licensees in this field."<sup>36</sup>

Thus the Commission's Notice of Proposed Rule Making<sup>37</sup> proposing initial FCC rules, the Report and Order<sup>38</sup> adopting rules, the Notice of Inquiry<sup>39</sup> in this proceeding and the instant Notice of Proposed Rule Making<sup>40</sup> all acknowledge this clear Congressional intent as to the definition of programming qualifying as responsive to the statute's mandate.

---

<sup>36</sup> Remarks of Sen. Inouye, supra note 19, at 10122.

<sup>37</sup> See, 1990 Notice supra note 22.

<sup>38</sup> See Report and Order supra note 23.

<sup>39</sup> See Notice of Inquiry supra note 2.

<sup>40</sup> See Notice supra note 4.